No. 498464

COURT OF APPEALS, DIVISION TWO,
OF THE STATE OF WASHINGTON

JPMORGAN CHASE BANK, N.A.,

Plaintiff/Respondent,

v.

DAVID ARTHUR MORTON, et al.,

Defendant/Appellant.

ANSWERING BRIEF BY RESPONDENT JPMORGAN CHASE BANK, N.A.

Fred B. Burnside, WSBA No. 32491
Frederick A. Haist, WSBA No. 48937
Hugh McCullough, WSBA No. 41453

Davis Wright Tremaine LLP
Attorneys for JPMorgan Chase Bank, N.A.

1201 Third Avenue, Suite 2200
Seattle, Washington 98101-3045
206-622-3150 (telephone)
206-757-7700 (fax)

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

David Morton concedes the primary issue in this appeal is simple, and it is—JPMorgan Chase Bank N.A. ("Chase") filed a judicial-foreclosure complaint in 2014 because Morton defaulted on his secured loan in February 2009 and Chase was entitled to enforce foreclosure rights under the Deed of Trust. Publicly recorded documents show that Morton's original lender, Franklin Financial, transferred Morton's original promissory note ("Note")–and the deed of trust ("Deed of Trust") securing the Note–to Bank One in 2001, and it is undisputed that Bank One merged into Chase in 2004, making Chase the holder of the Note with the right to foreclose. In an abundance of caution, Chase also submitted an affidavit testifying that it possessed Morton's Note, but that it was lost or destroyed: "The business records described above reflect that the Note was in JP Morgan Chase Custody Services, Inc.'s possession at the time it was lost or destroyed."[1] Under RCW 62A.3-309, this affidavit provided a second basis giving Chase the right to foreclose. These facts are sufficient to affirm the trial court's grant of summary judgment.

Morton appeals: 1) the judgment; 2) the trial court's denial of a motion to continue the summary judgment hearing, and 3) the trial court's denial of his reconsideration motion. His claims of error hinge entirely on

[1] JPMorgan Chase Custody Services, Inc., is a subsidiary of Chase. CP 58.

speculative allegations that Chase did not possess the Note. But he ignores Chase's unequivocal testimony that it in fact possessed the Note and the public records showing Franklin Financial assigned the Note to Bank One/Chase. He claims the trial court improperly admitted Chase's evidence, but its witnesses testified after reviewing Chase's business records, which is sufficient. He also argues Chase likely did not possess the Note because it attached a certified copy from the title company instead of a copy of the original (lost) Note. But the document was lost, so any accurate copy would suffice. Notably, Morton does not dispute the genuineness of the copy or that the Note was indorsed-in-blank. He also ignores that Chase is a successor assignee to Franklin Financial through transfer of the Note and Deed of Trust to Bank One, and Bank One's subsequent merger into Chase.

Morton argues that the trial court should have continued the summary judgment hearing under CR 56(f) to allow him to conduct discovery. But he fails to provide argument or authority as to how the trial court abused its discretion. Likewise, he argues the court wrongly denied his reconsideration motion but fails to show abuse of discretion.

The trial court correctly granted summary judgment for Chase, and this Court should affirm in all respects, because:

First, the undisputed evidence shows Chase held the indorsed-in-blank Note when it lost the Note; therefore, Chase could foreclose as a person entitled to enforce the Note under RCW 62A.3-309.

Second, the trial court did not abuse its discretion in denying Morton's CR 56(f) request to conduct discovery because he failed to identify what discovery he was likely to obtain, why he did not seek discovery earlier, or how any discovery would create a disputed issue of material fact.

Third, the trial court did not abuse its discretion in denying Morton's reconsideration motion because he offered no facts or law showing the trial court erred.

II. STATEMENT OF THE CASE

Morton's statement of the case is a generally correct overview of the case, albeit mixed with argument and irrelevant digressions. But Morton omits several key facts. Chase provides those facts below.

In May 2000, Morton borrowed $206,950.00 from Franklin Financial and promised to repay the loan in accordance with the Note, which the Deed of Trust secured. CP 1–4, 17–26, 30–32. Franklin Financial assigned the Note and Deed of Trust to Bank One NA, as reflected in the assignment publicly recorded on March 15, 2001. CP 4, 27. Bank One NA merged into Chase in 2004, and thus, Chase is

successor beneficiary on the Note and Deed of Trust. CP 4; *Ewing v. Glogowski*, 198 Wn. App. 515, 520 n.1 (2017); *Robertson v. GMAC Mortg. LLC*, 982 F. Supp. 2d 1202, 1205 n.1 (W.D. Wash. 2013).

Morton defaulted in February 2009. By March 17, 2014, he owed Chase $352,760.83. CP 4. Chase filed a judicial-foreclosure action March 19, 2014. CP 1–32. Morton answered March 26, 2015. CP 33–37. Chase successfully sought summary judgment on September 29, 2016. CP 38.

III. STANDARDS OF REVIEW

This Court reviews de novo an order granting summary judgment. *Hayden v. Mut. of Enumclaw Ins. Co.*, 141 Wn.2d 55, 63–64 (2000). Evidentiary rulings on summary judgment are also reviewed de novo. *Rice v. Offshore Sys., Inc.*, 167 Wn. App. 77, 85–86 (2012).

Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). The moving party bears the initial burden of showing the absence of an issue of material fact. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225 (1989). If the moving party meets this initial showing, the burden shifts to the opposing party. *Id*.

An opposing party "may [not] rely on 'speculation, argumentative assertions that unresolved factual issues remain, or in having its affidavits

considered at face value.'" *Rucker v. Novastar Mortg., Inc.*, 177 Wn. App. 1, 10 (2013) (quoting *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 13 (1986)). "Mere allegations or conclusory statements of facts unsupported by evidence are not sufficient to establish a genuine issue." *Rucker*, 177 Wn. App. at 10. The Court may affirm the ruling below on any ground supported by the record, "even if the trial court did not consider the argument." *King Cnty. v. Seawest Inv. Assocs., LLC*, 141 Wn. App. 304, 310 (2007).

An appellate court reviews a trial court's decision on whether to continue a summary judgment motion under CR 56(f) for abuse of discretion. *Barkley v. GreenPoint Mortg. Funding, Inc.*, 190 Wn. App. 58, 71 (2015), *rev. den. sub nom. Barkley v. JPMorgan Chase Bank*, 184 Wn.2d 1036 (2016). Likewise, an appellate court reviews a trial court decision on a reconsideration motion for abuse of discretion. *Christian v. Tohmeh*, 191 Wn. App. 709, 728 (2015), *rev. den.*, 185 Wn.2d 1035 (2016). An abuse of discretion exists only when the court exercises its discretion on manifestly unreasonable grounds. *Rettkowski v. Dep't of Ecology*, 128 Wn.2d 508, 519 (1996).

IV. ARGUMENT

Morton's arguments on appeal are notable for what he does not dispute: 1) he signed the Note and Deed of Trust; 2) he was in default

since February 2009; 3) Chase was his loan servicer; 4) only Chase had sought to collect payments; and 5) the entity entitled to enforce the Note was also entitled to foreclose. *See* RP 10, 12; CP 104–05. He also failed to provide any evidence to the trial court rebutting Chase's evidence of the lost note. These undisputed facts warrant summary judgment in favor of Chase. *Rucker*, 177 Wn. App. at 10; *Blair v. Nw. Tr. Servs., Inc.*, 193 Wn. App. 18, 29 (2016), *as amended on denial of reconsideration* (May 12, 2016), *rev. den. sub nom. Blair v. Nw. Tr. Servs.*, 186 Wn.2d 1019 (2016).

Rather than address the facts fatal to his arguments, Morton instead myopically focuses on whether Chase's lost-note affidavit was sufficient. But the sufficiency of the affidavit is a red herring and irrelevant. A lost-note affidavit is not even required to enforce the terms in a lost note. *JPMorgan Chase Bank, N.A. v. Stehrenberger*, 180 Wn. App. 1047, at *4 (2014) (unpublished). Nevertheless, Chase established it could foreclose both through the affidavit ***and*** because it was an assignee. RP 12–14; CP 3, 28–32, 34 (¶¶ 9–10) 55–59. Morton's arguments challenging those facts have no merit.

A. The Trial Court Correctly Granted Summary Judgment because Chase Could Foreclose as a Note Holder under RCW 62A.3-309

RCW 62A.3-309 states a person not in possession of an instrument is entitled to enforce it if:

> (i) the person was in possession of the instrument and entitled to enforce it when loss of possession occurred, (ii) the loss of possession was not the result of a transfer by the person or a lawful seizure, and (iii) the person cannot reasonably obtain possession of the instrument because the instrument was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person or a person that cannot be found or is not amenable to service of process.

Chase met this test.

1. Chase Established It Was a Note Holder Through the Lost-Note Affidavit

The lost-note affidavit establishes Chase was a Note holder who could foreclose by stating: "The business records described above reflect that the Note was in JP Morgan Chase Custody Services, Inc.'s possession at the time it was lost or destroyed." CP 29 ¶ 4, 59 ¶ 4. Because Chase lost the Note, the analysis is straightforward. Chase was in possession of the indorsed-in-blank Note. CP 28–32, 55–59. As a holder of the indorsed-in-blank Note, Chase was the beneficiary and entitled to enforce it at the time it was lost (satisfying the first element). *Brown v. Washington State Dep't of Commerce*, 184 Wn.2d 509, 535–36 (2015) ("M & T Bank is the holder of Brown's note because M & T Bank possesses the note and because the note, having been indorsed in blank, is payable to bearer. RCW 62A.1-201(21)(A) (holder); RCW 62A.3-205(b) (indorsed in blank). As the

holder of the note, M & T Bank is entitled to enforce the note"); *Pooley v. Quality Loan Serv. Corp. of Wash.*, 2017 WL 3476781, at *1 (Wash. Ct. App. Aug. 14, 2017) (unpublished); *Blair*, 193 Wn. App. at 33 ("Consequently, the Brown court concluded that the servicer in possession of the note indorsed in blank was the DTA beneficiary"); *John Davis & Co. v. Cedar Glen No. Four, Inc.*, 75 Wn.2d 214, 222–23 (1969) ("The holder of a negotiable instrument may sue thereon in his own name, and payment to him in due course discharges the instrument . . . . It is not necessary for the holder to first establish that he has some beneficial interest in the proceeds.").

Chase presented a certified copy of the indorsed-in-blank Note, which Morton did not dispute was a true and correct copy. CP 3, 30–32, 34 (¶¶ 9–10), 55–57. Morton presented no evidence on summary judgment (and none exists) that Chase transferred the Note or that anyone seized the Note from Chase (satisfying the second element). Chase cannot find the Note (satisfying the third element). Chase's affidavit thus fulfills all of these requirements, as the trial court correctly found. RP 12–13. Chase therefore had the right to foreclose, and because there was no dispute over Morton's default, the trial court correctly granted summary judgment.

2. Chase was a Note Holder as an Assignee

Even if the Court ignores Chase's lost-note affidavit—and there is no basis to do so—there is still sufficient evidence showing Chase legally was the Note holder at the time the Note was lost. RCW 62A.3-309(b) does not require any specific declaration or affidavit—it only requires evidence showing a right to enforce the Note. A review of the record shows Chase has such a right.

Franklin Financial possessed the Note and was entitled to enforce it because Morton admits signing the instrument and leaving it with Franklin Financial. CP 3, 34 ¶¶ 9–10. Chase presented undisputed evidence that Franklin Financial assigned the Note and Deed of Trust to Bank One, as shown by a recorded assignment. CP 27. Bank One merged into Chase and Chase was its successor. CP 4; *Ewing*, 198 Wn. App. at 520 n.1; *Robertson*, 982 F. Supp. 2d at 1205 n.1. Courts presume that an assignee who provides proof of acquisition is entitled to recover on the note. *See Metro. Mortgage & Sec. Co., Inc. v. Becker*, 64 Wn. App. 626, 630 (1992); *In re United Home Loans, Inc.*, 71 B.R. 885, 889 (W.D. Wash. 1987) ("Where, as here, an assignment of a mortgage also mentions that the debt is being transferred, the transfer of both is complete").

This recorded assignment meets Chase's burden of proof on summary judgment that it was entitled to enforce the Note and foreclose

on the Deed of Trust. Morton presented no contrary evidence on summary judgment (and none exists) showing Franklin Financial or Bank One transferred the Note to anyone else or anyone else possessed it. RP 10. Thus, Chase had the legal right to enforce the Note through the transfers. Morton never argued there was a subsequent transfer (he essentially conceded the issue—RP 10) so he has waived any challenge. *See e.g.*, RAP 2.5, 12.1; *Mangat v. Snohomish Cty.*, 176 Wn. App. 324, 334 (2013); *US W. Commc'ns, Inc. v. Wash. Utilities & Transp. Comm'n*, 134 Wn.2d 74, 112 (1997), *as corrected* (Mar. 3, 1998).

Indeed, Chase still had the right to enforce the Note even if Franklin Financial lost it—which there is no evidence it did.[2] Again, Franklin Financial certainly had possession of the Note and could enforce it. Since Franklin Financial possessed and was entitled to enforce the Note, Bank One was entitled to enforce it as an assignee and also had the ability to enforce it under RCW 62A.3-309. *Puget Sound Nat'l Bank v. State Dep't of Rev.*, 123 Wn.2d 284, 292–93 (1994) ("an assignment carries with it the rights and liabilities as identified in the assigned contract, but also all applicable statutory rights and liabilities. To hold otherwise would be contrary to the rule that the assignee acquires

[2] And, since Chase is the successor to Bank One, if Bank One lost the Note, Chase had Bank One's rights to enforce it.

whatever rights the assignor possessed prior to the assignment"); *see also Fed. Fin. Co. v. Gerard*, 90 Wn. App. 169, 183 (1998). Chase succeeded to the rights of Bank One, including the right to enforce a lost note. *See* RCW 23B.11.060.

The official comments to Washington's Uniform Commercial Code affirm that Franklin Financial had the power to transfer to Bank One its rights under RCW 62A.3-309 (and then through merger, from Bank One to Chase) even if it lost the Note before the transfer. Those comments provide:

> Also, the right under Section 3-309 to enforce a lost, destroyed, or stolen negotiable promissory note may be sold to a purchaser who could enforce that right by causing the seller to provide the proof required under that section. This Article rejects decisions reaching a contrary result, *e.g.*, *Dennis Joslin Co. v. Robinson Broadcasting*, 977 F. Supp. 491 (D.D.C. 1997).

RCW 62A.9A-109, cmt. 5. The Permanent Editorial Board for the Uniform Commercial Code agrees that courts should interpret Washington's version of UCC 3-309 to authorize a transferee from the person who lost possession of a note to qualify as a person entitled to enforce it. Report of the Permanent Editorial Bd. for the Uniform Comm. Code, *Application Of The Uniform Commercial Code To Selected Issues*

Relating To Mortgage Notes, at 6 n.25 (ALI Nov. 14, 2011)[3]; *see also In re Allen*, 472 B.R. 559, 567–69 (B.A.P. 9th Cir. 2012).

Morton also argues that the trial court has to make a finding that he is protected against loss if a third party appears claiming to possess the original Note.[4] The trial court did not err on this issue. As discussed, Chase held the original Note when it was lost and did not transfer it. Also as discussed, Chase was an assignee, Morton failed to provide any evidence to the trial court showing that a third party could possibly possess the Note. *Stehrenberger*, 180 Wn. App. 1047, at *5 ("There is no evidence that she is at risk of having any entity other than Chase attempt to enforce the loan. Given this low risk, the trial court did not abuse its discretion when it denied the CR 59 motion"). Morton also admitted he was in default so someone could foreclose. CP 72.

Because Chase expressly waived any deficiency judgment—*i.e.*, the right to pursue the remaining balance on the loan if sale proceeds prove insufficient to satisfy the entire obligation, CP 6, ¶ 26—Morton is economically indifferent as to whether a third party held the Note because

[3] It is available at http://www.uniformlaws.org/Shared/Committees_Materials/PEBUCC/PEB_Report_111411.pdf.

[4] Morton failed to include this argument in his brief as originally filed; he only added it after the clerk rejected his filing for not including the issues for his assignments of error. The Court should ignore this argument because it is untimely.

no third party could ever sue him to collect on the Note. This is because, in the absence of a deficiency right, a foreclosure sale "does not injure the borrower's interests" as to third parties "because the debt secured . . . is *per se* satisfied by the foreclosure sale," and any third party creditor remedy lies against the foreclosing party (not the borrower). *Udall v. T.D. Escrow Servs., Inc.*, 159 Wn.2d 903, 916 (2007) (reversing holding that wrongful foreclosure should be vacated); *see also* RCW 61.24.100 (preventing any person from obtaining a deficiency judgment against a borrower "on the obligations secured by a deed of trust . . . after a trustee's sale under that deed of trust."). Thus, after a foreclosure sale, Morton does not owe on the debt and therefore no risk of liability to a third party on the extinguished debt.

Morton defaulted in February 2009, more than eight years ago. Presumably if some third party were entitled to enforce the Note, it would have come forward by now. But even if a third party appeared and produced the Note, all that would happen is that the third party would step into Chase's shoes. Morton would not lose any rights or be damaged in any way. Regardless, the trial court found that Morton did not prove such a situation. RP 10, 12–13. The evidence in the record shows Chase had the right to enforce the Note (and that no one else did), and this Court should therefore affirm the trial court's decision.

3. Morton's Evidentiary Arguments Challenging Chase's Note Holder Status Lack Merit

Morton challenges Chase's evidence by arguing that the Theener and Laird declarations were inadmissible due to a lack of personal knowledge. After reviewing Chase's records, Theener and Laird testified to two independent facts: 1) Chase possessed the Note at one point; and 2) the Note was lost after Chase obtained it. CP 28–29, 49, 58–59. Both pieces of testimony were proper because Theener and Laird relied on business records. Business records are not hearsay and are admissible as evidence. ER 803(6); RCW 5.45.020. Indeed, information obtained from the contents of business records is also admissible—otherwise it would be impossible for a large business to provide any evidence (a fact recognized by the trial court). *See* RP 7–8; *Patrick v. Wells Fargo Bank, N.A.*, 196 Wn. App. 398, 414 (2016), *rev. den. sub nom. Patrick v. Wells Fargo Bank*, 187 Wn.2d 1022, (2017) ("A declaration statement based on a review of business records satisfies the personal knowledge requirement if the declaration satisfies RCW 5.45.020"); *Barkley*, 190 Wn. App. at 67–68 (same).

The trial court properly admitted the Theener and Laird declaration and affidavit, and this Court and others have rejected substantially identical challenges. *See Bavand v. OneWest Bank*, 196 Wn. App. 813,

828 (2016), *as modified* (Dec. 15, 2016) ("His testimony establishes that OneWest took possession of Bavand's original promissory note and deed of trust in March 2009. The testimony also establishes that OneWest has maintained possession of these loan documents at all times material to this litigation"); *Merry v. Quality Loan Serv. Corp.* 189 Wn. App. 1045, at *6 (2015) (unpublished) ("Because Mr. Merry only attacks Ms. Alegría's and Mr. Edwards's qualifications as declarants and does not provide any of his own evidence to dispute their statements, the trial court properly considered the declarations"); *Guttormsen v. Aurora Bank, FSB*, 189 Wn. App. 1019, at *4 (2015), *rev. den. sub nom. Guttormsen v. Bank*, 184 Wn.2d 1036 (2016) (unpublished); *Renata v. Flagstar Bank, F.S.B.*, 189 Wn. App. 1004, at *4 (2015), *rev. den.*, 185 Wn.2d 1003 (2016) (unpublished).

Ignoring the mountain of precedent showing Chase's declarations are admissible, Morton argues Chase's evidence is inadmissible under *Podbielancik v. LPP Mortg. Ltd.*, 191 Wn. App. 662, 667–68 (2015) because Chase did not also submit the documents Theener and Laird reviewed with their declarations. He is wrong. *Podbielancik* stands only for the proposition that when a declarant recites the contents of a business record, the party must also submit the record to the court. *Podbielancik* does not require a declarant to submit all of the documents reviewed to

testify to an independent fact obtained from that review. *Guttormsen*, 189 Wn. App., at *4 ("The Guttormsens cite no authority, and we have found none, requiring a declarant to attach documentation to verify each assertion made"); *Nilsen v. Quality Loan Servicing Corp. of Wash.*, 193 Wn. App. 1010, at *3 (2016) (unpublished). A contrary holding would overwhelm courts with superfluous documents if a declarant had to submit every record reviewed to be able to testify to any fact known by a corporate entity. Morton's argument lacks merit.

Finally, Morton argues that Chase's submission of a certified copy of the Note from the title company instead of a "clean" copy shows it did not possess it. This argument fails for several reasons.

First, RCW 62A.3-309(b) does not require any special copy of a note; it only requires a document showing the terms. Morton does not dispute that the copy Chase provided was correct and included the terms.

Second, Morton attacks the use of a certified copy instead of a copy that lacks such a guarantee of genuineness. Such an argument, if accepted, would destroy the entire point of certification.

Third, his argument is also illogical—if Chase lost the Note, it could not make a "clean" copy. Failing to provide a "clean" copy does not imply Chase did not possess the Note, it only implies Chase did not make a clean copy.

Fourth, Franklin Financial undisputedly transferred the Note (and the rights under RCW 62A.3-309) to Bank One (and by merger, Chase), so Chase's physical possession of the Note is entirely irrelevant to its right to foreclose. Morton fails to provide any other evidence to show Chase did not possess the Note, so to the extent his arguments depend on his "copy" theory, the Court should affirm the trial court.

B. The Trial Court did Not Abuse Its Discretion in Denying Morton's CR 56(f) Request

A party's CR 56(f) request is properly denied when: (1) the party fails to state what evidence it would establish through additional discovery; (2) the evidence the party seeks would not raise a genuine issue of fact, rendering delay and further discovery futile; or (3) the party fails to offer good reason for its delay in obtaining the evidence desired. *Molsness v. City of Walla Walla*, 84 Wn. App. 393, 400 (1997). Failure to meet one of these requirements is fatal. *Manteufel v. SAFECO Ins. Co*., 117 Wn. App. 168, 175 (2003).

1. Morton Failed to Establish What Evidence He Would Obtain

As an initial matter, Morton's argument as to why the trial court should have granted his CR 56(f) request consists of three sentences. "Such '[p]assing treatment of an issue or lack of reasoned argument is

insufficient to merit judicial consideration. [Citations omitted.]'" *Joy v. Dep't of Labor & Indus.*, 170 Wn. App. 614, 629 (2012).

Even if Morton had provided an argument, the trial court correctly denied his request for a continuance. Continuing a summary judgment motion for discovery "is not justified if the party fails to support the request with an explanation of the evidence to be obtained through additional discovery." *Molsness*, 84 Wn. App. at 400–01. All Morton provided was his counsel's declaration that "I believe Chase will not be able to establish that Franklin Financial ever physically transferred the Morten note to JP Morgan Chase Bank NA." CP 85 ¶ 3. "Vague or wishful thinking is not enough." *Molsness*, 84 Wn. App. at 400–01 (holding trial court did not abuse discretion by denying continuance). Morton's declaration is not even a discovery request, and he does not explain how it raises a material issue of disputed fact. Morton also does not elaborate on ***what*** evidence he thought he would obtain.

2. Morton had No Good Reason for Failing to Obtain the Discovery Timely

Morton answered on March 26, 2015, and Chase moved for summary judgment a year-and-a-half later on September 29, 2016. CP 33–38. Neither Morton's CR 56(f) declaration nor his opening brief provides a reason why he waited until Chase filed a summary judgment motion to

request discovery. CP 85. Morton had plenty of time to conduct discovery.[5] CP 81–85. CR 56(f) is not intended to endorse inaction and delay. *Bridges v. ITT Research Inst.*, 894 F. Supp. 335, 337 (N.D. Ill. 1995) ("Rule [56(f)] is not to be used as a delay tactic or scheduling aid for busy lawyers"); *Pfingston v. Ronan Eng'g Co.*, 284 F.3d 999, 1005 (9th Cir. 2005) ("The failure to conduct discovery diligently is grounds for denial of a Rule 56(f) motion.").[6] Waiting until the last minute is not a basis for continuing a motion and is not a reason to review the trial court's determination.

3. Morton's Requested Evidence Would Not Create a Dispute of Fact

Morton also cannot satisfy the second element of the *Molsness* requirements for several reasons. First, Morton does not explain what specific evidence he sought, except for a vague assertion that the supposed evidence will support his theory of non-receipt.

Second, Chase provided unequivocal evidence it possessed the Note. CP 28–32, 55–59. Without any foundation, Morton apparently

[5] Morton's last-minute retention of counsel does not change this result as he failed to explain why he waited until three days before his response was due to retain counsel. CP 81-85. Again, he had plenty of time to conduct discovery before the hearing—counsel is not needed to conduct discovery.
[6] Washington state courts interpret CR 56(f) consistently with its federal counterpart. *Turner v. Kohler*, 54 Wn. App. 688, 693 (1989) (looking to Fed. R. Civ. P. 56(f)).

assumed Chase's records would show non-receipt despite testimony to the contrary. CP 3; Brief p. 9, 11–12. The mere possibility that discoverable evidence may exist is not sufficient. *Molsness*, 84 Wn. App. at 401.

Third, even if Chase did not possess the Note because it was lost before a transfer to Chase—which is contrary to all evidence—it still could foreclose on the Note and Deed of Trust because, as discussed above, Franklin Financial transferred the Note and Deed of Trust to Bank One, which then merged with Chase, giving Chase the right to foreclose.

C. The Trial Court did Not Abuse its Discretion in Denying Morton's Motion for Reconsideration

To reverse a trial court order denying reconsideration of a summary judgment order, a party must first show the trial court incorrectly granted summary judgment. Morton fails to do so. Thus, the trial court correctly denied reconsideration. In any event, Morton fails to provide any reasoned argument as to why the trial court erred in denying the reconsideration motion, other than concluding it was wrong. This Court should not review the trial court's ruling. *Joy*, 170 Wn. App. at 629.

Below, Morton argued the trial court should reconsider its grant of summary judgment under CR 59(a)(7) (lack of evidence) and (8) (error of law). But the trial court had no basis to grant Morton's motion under CR 59(a)(7) and (8). Chase submitted evidence that it possessed the Note

when the Note was lost. CP 28–32, 55–59. Morton failed to present any facts in dispute—instead, he merely attacked the sufficiency of Chase's declarations and their admissibility. His attack on Chase's declarations does not show lack of evidence or an error of law. *See Merry*, 189 Wn. App., at *7 ("Because Mr. Merry only attacks Ms. Alegría's and Mr. Edwards's qualifications as declarants and does not provide any of his own evidence to dispute their statements, the trial court properly considered the declarations"). And, as discussed above, Morton's evidentiary objections and challenges lack merit and the declarations were admissible. *See Patrick*, 196 Wn. App. at 414; *Barkley*, 190 Wn. App. at 67–68; *Bavand*, 196 Wn. App. at 828; *Guttormsen*, 189 Wn. App., at *4; *Renata*, 189 Wn. App., at *4. The trial court did not err—it correctly denied the reconsideration motion.

V. CONCLUSION

For the reasons set forth above, this Court should affirm the trial court's: 1) grant of summary judgment; 2) denial of Morton's CR 56(f) request, and 3) denial of his motion for reconsideration. The trial court record establishes that Chase held the Note when it was lost, Morton provides no evidence controverting that fact, and his evidentiary objections lack merit. Morton failed to show what facts he believed he would obtain in discovery, so the trial court correctly denied his CR 56(f)

request. And because summary judgment was proper, the trial court correctly denied Morton's reconsideration motion. This Court should therefore affirm the trial court's decisions in their entirety.

DATED this 6th day of September, 2017.

Davis Wright Tremaine LLP

By */s/Frederick A. Haist*
Fred B. Burnside, WSBA #32491
Frederick A. Haist, WSBA #48937
Hugh McCullough, WSBA #41453

1201 Third Avenue, Suite 2200
Seattle, WA 98101-3045
Telephone: (206) 757-7700
Fax: (206) 622-3150
fredburnside@dwt.com
frederickhaist@dwt.com
hughmccullough@dwt.com

CERTIFICATE OF SERVICE

I hereby certify that on the date of this certificate I caused a copy of the foregoing to be served upon the following counsel of record:

Jason E. Anderson, WSBA #32232 5355 Tallman Avenue NW #207 Seattle, WA 98107 Email: jason@jasonandersonlaw.com	(X) ( ) ( ) ( )	By U. S. Mail By E-Service By Facsimile By Messenger

Attorney for Respondent David Arthur Morton

Julie A. Phillips, WSBA #32735 Aldridge Pite, LLP 9311 S.E. 36th Street, Suite #100 Mercer Island, WA 98040 Email: jphillips@aldridgepite.com	(X) ( ) ( ) ( )	By U. S. Mail By E-Service By Facsimile By Messenger

Attorneys for Appellant JPMorgan Chase, N.A.

DATED this 6th day of September, 2017.

Davis Wright Tremaine LLP

By */s/Christine Kruger*
Christine Kruger

DAVIS WRIGHT TREMAINE LLP

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